

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Developing a Unified Intercarrier)	
Compensation)	CC Docket No. 01-92
Regime)	
)	
T-Mobile <i>et al.</i> Petition for Declaratory)	
Ruling Regarding Incumbent LEC Wireless)	
Termination Tariffs)	

**NEXTEL PARTNERS, INC. COMMENTS AND OPPOSITION
IN RESPONSE TO
PETITIONS FOR CLARIFIATION OR RECONSIDERATION**

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SUMMARY

Nextel Partners, Inc. (“Nextel Partners”) files these Comments and Opposition in response to various Petitions filed in response to the Commission’s Declaratory Ruling and Report and Order in this proceeding. The Petitions address the Commission’s adoption of new subsection 20.11(f) of its rules, which extends to CMRS providers the negotiation and arbitration provisions applicable to ILECs under Section 252 of the Communications Act.

Nextel Partners concurs with the Petition filed by Rural Cellular Association (“RCA”), which asks the Commission to clarify that new subsection 20.11(f) applies only to reciprocal compensation negotiations, and not to the other requirements of Section 252 of the Act, including interconnection obligations. As pointed out by RCA and by American Association of Paging Carriers (“AAPC”), such an extension of the Section 252 interconnection obligations to CMRS carriers would contravene the Act and established precedent. Moreover, such a sweeping change to interconnection rules in the context of the present proceeding, which was instituted to address intercarrier compensation rules under the *existing* interconnection regime, would violate the Administrative Procedures Act, 5 USC § 553(b)(3), which requires prior notice of proposed changes to rules.

The Commission should deny the Petition filed by the Missouri Small Telephone Company Group (“MoSTCG”), which seeks to expand the rights of rural ILECs to “opt in” to existing reciprocal compensation or traffic termination agreements between a CMRS carrier and another ILEC. The MoSTCG request is contrary to Congressional policy supporting reciprocal compensation negotiations that promote competition through

rates, terms and conditions tailored to meet specific marketplace requirements. The primary purpose of Section 252(i) is to prevent discrimination by ILECs who have the market power to favor one requesting carrier over another; the same protection is not needed for ILECs because of the competitive nature of the CMRS industry and the market power of ILECs within their own local service areas. Moreover, because of the uniqueness of ILEC service areas, a reverse opt-in rule of the sort proposed by MoSTCG would not be workable.

Finally, Nextel Partners supports the Petition of T-Mobile, which asks the Commission to clarify the applicable pricing rules for periods of negotiations between CMRS carriers and ILECs, and for assessing the legality of previously-filed wireless termination tariffs during past periods.

TABLE OF CONTENTS

	Page
SUMMARY.....	i
TABLE OF CONTENTS.....	iii
I. INTRODUCTION.....	1
II. THE COMMISSION SHOULD CLARIFY THAT IT IS NOT IMPOSING SECTION 252 INTERCONNECTION NEGOTIATION OBLIGATIONS ON CMRS CARRIERS.....	4
III. THE COMMISSION SHOULD DENY THE MOSTCG PETITION.....	6
A. Application of The Opt-In Rule To Rural ILECs is Neither Supported by the Communications Act Nor Workable.....	7
B. Application of the Opt-In Rule to Rural ILECs Would Subvert the Policy Goals of Sections 251 and 252.....	9
IV. THE COMMISSION SHOULD GRANT THE CLARICATION REQUESTED BY T-MOBILE.....	12
V. CONCLUSION.....	13

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**NEXTEL PARTNERS' COMMENTS AND OPPOSITION
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PETITIONS FOR CLARIFICATION OR RECONSIDERATION**

Nextel Partners, Inc. ("Nextel Partners"), by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby files these Comments and Opposition in response to various Petitions filed in response to the Commission's Declaratory Ruling and Report and Order in the above-captioned proceeding.¹

I. INTRODUCTION

Nextel Partners supports the separate Petitions filed by American Association of Paging Carriers ("AAPC"),² Rural Cellular Association ("RCA")³ and T-Mobile USA,

¹ *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order*, 20 FCC Rcd. 4855 (rel. Feb. 24, 2005) ("Declaratory Ruling"). The Commission issued a Public Notice specifying that oppositions to the Petitions would be due on June 30, 2005. *Petitions for Reconsideration of Action in Rulemaking Proceeding*, Public Notice, 2005 Lexis 3184 (June 3, 2005), appearing at 70 Fed. Reg. 34766 (June 15, 2005)

² See American Association of Paging Carriers Petition for Reconsideration, CC Docket No. 01-92 (filed Apr. 29, 2005).

Inc. (“T-Mobile”).⁴ Nextel Partners opposes the Petition filed by the Missouri Small Telephone Company Group (“MoSTCG”).⁵

The Declaratory Ruling is the outgrowth of a petition filed by four CMRS providers asking that the Commission affirm the unlawfulness of wireless termination tariffs filed by ILECs. In its Declaratory Ruling, the Commission clarified that going forward, ILECs are prohibited from utilizing wireless termination tariffs as a mechanism for imposing compensation obligations for non-access CMRS traffic (*i.e.*, traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (“MTA”)).⁶ In taking jurisdiction and prohibiting the tariffs, the Commission relied, in part, upon Section 332(c)(1)(B) of the Act, 47 U.S.C. § 332(c)(1)(B), which states that “upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service....”⁷ Noting its preference for negotiated reciprocal compensation agreements, the Commission prohibited the tariffs.⁸

³ See Rural Cellular Association Petition for Clarification or, In the Alternative, Reconsideration, CC Docket No. 01-92 (filed Apr. 29, 2005).

⁴ See T-Mobile USA, Inc. Petition for Clarification or, In the Alternative, Reconsideration, CC Docket No. 01-92 (Apr. 29 2005).

⁵ See Missouri Small Telephone Company Group Petition for Reconsideration, CC Docket No. 01-92 (received by the FCC on Mar. 25, 2005).

⁶ Declaratory Ruling, at ¶ 14.

⁷ *Id.*

⁸ *Id.* (“...[P]recedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act.”).

In striking down future wireless termination tariffs as an appropriate means for ILEC compensation, the Commission took the further step of ruling that an ILEC “may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures established under Section 252 of the Act.”⁹ Thus, the Commission adopted a new subsection (f) under Section 20.11 of its rules,¹⁰ extending to CMRS providers for the first time the negotiation and arbitration obligations made applicable to ILECs under Section 252 of the Act.¹¹ The various Petitions were filed in response to this extension of Section 252 of the Act.

RCA and AAPC assert in their Petitions that the Commission’s adoption of subsection 20.11(f) may unlawfully extend the interconnection negotiation and arbitration procedures of Section 252 of the Act in a way that places obligations on CMRS carriers that are not countenanced by the Act. Nextel Partners concurs with the arguments set forth by RCA and AAPC in this regard. Additionally, AAPC asserts that the Commission adopted new Section 20.11(f) without providing adequate advance notice and opportunity for comment as required by the Administrative Procedures Act (“APA”), 5 USC § 553(b)(3).¹² In light of the sweeping changes that new Section 20.11(f) on its face appears to bring, Nextel Partners concurs that prior to adopting such a rule, the issuance of a NPRM specifically addressing the possible extension of Section 252 interconnection obligations to CMRS carriers was warranted and indeed mandated by the

⁹ *Id.*, at ¶ 16.

¹⁰ 47 CFR § 20.11(f), set forth at Appendix A of the Declaratory Ruling.

¹¹ 47 USC § 252.

¹² *See* AAPC Petition at p.4.

APA. The Commission should issue a reconsidered order clarifying that subsection 20.11(f) applies only to reciprocal compensation negotiations, and does not impose new physical interconnection negotiations on CMRS providers.

The MoSTCG Petition takes the position that the Commission did not go far enough in new subsection 20.11(f). MoSTCG seeks to expand the rights of rural ILECs even further, by requesting a Commission ruling that would allow rural ILECs to “opt in” to existing reciprocal compensation or traffic termination agreements between another rural ILEC and a CMRS provider that has been approved by a state commission pursuant to Section 252 of the Act. As set forth below, the MoSTCG proposal is not supported by law or policy and must be rejected.

The T-Mobile Petition asks the Commission to clarify the pricing rules that apply during the period of reciprocal compensation negotiations between ILECs and CMRS carriers, as well as to proceedings related to the application of wireless termination tariffs to past periods. Nextel Partners concurs with T-Mobile’s recommended clarifications.

II. THE COMMISSION SHOULD CLARIFY THAT IT IS NOT IMPOSING SECTION 252 INTERCONNECTION NEGOTIATION OBLIGATIONS ON CMRS CARRIERS.

As explained in the RCA Petition, the language of new subsection 20.11(f) could be interpreted as extending to CMRS providers the additional interconnection obligations applicable to ILECs under Section 252 of the Act. As RCA states, it is unlikely that the Commission intended to contravene the Act and established precedent by extending interconnection obligations in this way.¹³ New subsection 20.11(f) as currently written

¹³ See RCA Petition at p.3.

appears to “rewrite the statute by making the right to request interconnection bilateral, not unilateral, and it is therefore palpably in conflict with the statute.”¹⁴ This could not have been the Commission’s intent since, as RCA suggests, the instant docket concerns the examination of “the proper mechanism for establishing reciprocal compensation arrangements between LECs and CMRS providers” whereas new subsection 20.11(f) as currently written could instigate a “sea change in the interconnection obligations of CMRS providers.”¹⁵

The promulgation of such a sweeping change in the context of the instant proceeding would, as AAPC asserts,¹⁶ violate the APA stricture that agencies can promulgate legislative rule changes *only* after giving the regulated community prior notice of proposed changes and an opportunity to comment thereon.¹⁷ It is well established that “new rules that work substantive changes in prior regulations are subject to the APA’s [notice and comment] procedures.”¹⁸ That has not occurred here. In fact, the NPRM establishing the scope of the instant proceeding indicates in its opening paragraph the Commission’s intent to examine intercarrier compensation under *existing* interconnection regulations:

With this *Notice of Proposed Rulemaking (NPRM)*, we begin a fundamental re-examination of all currently regulated forms of intercarrier compensation. We intend to test the concept of a unified regime for the flows of payments among telecommunications carriers *that result from the*

¹⁴ AAPC Petition at p.4.

¹⁵ See RCA Petition at p.2.

¹⁶ See AAPC Petition at p.4.

¹⁷ See 5 USC § 553(b)(c).

¹⁸ *Sprint Corporation v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003).

*interconnection of telecommunications networks under current systems of regulation.*¹⁹

The Commission's request for comment on the T-Mobile, *et al.* Petition for Declaratory Ruling did not expand the scope of the inquiry in this docket to include a potential re-write of the current system of regulation of interconnection.²⁰ As a result, the application of the Section 252 interconnection negotiation requirements to CMRS carriers in the context of this proceeding would violate the prior notice requirements of the APA and would thus be unlawful.

Accordingly, the Commission should issue a reconsidered order clarifying that new subsection 20.11(f) applies only to intercarrier compensation negotiations, and does not impose new physical interconnection negotiations on CMRS providers.

III. THE COMMISSION SHOULD DENY THE MOSTCG PETITION.

The MoSTCG Petition requests that the Commission amend its rules so that small ILECs may “opt in” to reciprocal compensation or traffic termination agreements between wireless carriers and other rural ILECs that have been approved by a state commission pursuant to Section 252 of the Communications Act, 47 U.S.C § 252. MoSTCG's request is contrary to Congressional and Commission policy supporting reciprocal compensation negotiations that promote competition through rates, terms and conditions tailored to meet specific marketplace requirements. In light of the unique negotiation factors between Nextel Partners and each ILEC it interconnects with, a

¹⁹ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, at ¶ 1 (2001) (emphasis added).

²⁰ *See Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, Public Notice, 17 FCC Rcd. 19046 (2002).

“carbon copy” agreement rubber-stamping the same rates, terms and conditions for every rural ILEC service area is contrary to the pro-competition requirements of the Act.

Indeed, because of the uniqueness of ILEC service areas such a “carbon copy” (all or nothing) agreement between an “opt in” ILEC and a wireless carrier is not even possible. Moreover, applying the “opt in” rule to rural ILECs does nothing to foster the pro-competition underpinnings of the 1996 Act. ILECs serving different rural areas are not in competition with each other. Therefore, a rural ILEC will not suffer any anticompetitive harm from an inability to “opt-in” to the same terms and conditions for interconnection that are granted to another rural ILEC in another market. Applying any form of an “opt in” approach to rural ILECs is contrary to Congressional policy set forth in Sections 251 and 252 of the Act, 47 U.S.C. §§ 251, 252, promoting *negotiated* interconnection agreements and will serve to impede competition and harm rural consumers. Therefore, the MoSTCG Petition must be denied.

A. Application of The Opt-In Rule To Rural ILECs is Neither Supported by the Communications Act Nor Workable.

There is no legitimate basis in law or policy to apply the “opt-in” rule to rural ILECs. The MoSTCG’s reliance on Section 252(i) of the Act, 47 U.S.C. § 252(i), as a legal basis for the Commission to make the “opt-in” rule available to rural ILECs is misplaced.²¹ The plain language of that provision of the Act requires a *local exchange carrier* to make available to a requesting telecommunications carrier the same terms and

²¹ MoSTCG Petition, at ¶ 2.

conditions as contained in an agreement to which the *local exchange carrier* is already a party. Section 252 does not mandate the reciprocal requirement for CMRS carriers.²²

The primary purpose of Section 252(i) is to prevent discrimination by local exchange carriers who have the market power to favor one requesting carrier over another, thus inhibiting competition in the local market.²³ This same protection is not necessary for the LECs because of the competitive nature of the CMRS industry and the market power of ILECs within their own local service areas.

Indeed, the application of a reciprocal “opt-in” rule for rural ILECs is not even workable in light of the Commission’s recent decision to interpret the requirements of Section 251(i) as requiring that a requesting carrier must “opt-in” to an existing agreement in its entirety and no longer has the right to “pick and choose” certain elements of an agreement.²⁴ In light of the uniqueness of each ILEC service area, the “all or nothing” approach would prohibit other ILECs from opting-in to an agreement between a CMRS carrier and an ILEC that is tailored to meet the unique negotiation factors of the first ILEC’s local service area. A “carbon copy” agreement rubber-stamping rates, terms and conditions for more than one ILEC within a state is simply not feasible.

²² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15996, ¶ 1005 (1996) (holding that CMRS providers are not classified as local exchange carriers).

²³ *Id.*, at 16139, ¶ 1315; See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd. 13494, 13505, ¶ 19 (2004) (“ILEC Unbundling Second Report and Order”).

²⁴ See ILEC Unbundling Second Report and Order, 19 FCC Rcd. at 13495, ¶ 1.

B. Application of the Opt-In Rule to Rural ILECs Would Subvert the Policy Goals of Sections 251 and 252.

Even assuming *arguendo* that some form of an opt-in rule could be made applicable to ILECs under certain circumstances, any such approach would undermine the goals of Sections 251 and 252 “to promote negotiated interconnection agreements.”²⁵ Such a rule change would undermine a wireless carrier's provision of competitive service by giving rural ILECs the right to unilaterally *opt-out* of their Section 251 and 252 negotiation obligations. This would hurt competitors in rural areas and penalize a wireless carrier for choosing to enter into a negotiated interconnection agreement based on circumstances specific to one rural ILEC negotiation.

Nextel Partners’ real world experience in negotiating interconnection agreements with rural ILECs is instructive in how allowing rural ILECs to avoid negotiations of specific rates, terms and conditions would harm wireless carriers and the rural consumer. As a startup company several years ago, Nextel Partners decided in some cases to enter into interconnection agreements with various rural ILECs that may have contained rates, terms and conditions that probably could not be supported in an arbitration.²⁶ Nextel Partners made a business decision to sign these interconnection agreements with these rural ILECs in light of the business pressures associated with opening new markets as well as the small amount of traffic at the time. While Nextel Partners could not have been forced to sign any such agreement with terms that could not be supported under the

²⁵ *Id.*, at ¶ 12.

²⁶ For example, in at least one agreement Nextel Partners waived its right to reciprocal compensation, agreed to a rate that was not supported by a forward looking cost study, and undertook transport obligations that under law should be assigned to the rural ILEC.

Act, it voluntarily agreed to those terms, as permitted by 47 U.S.C. § 252(a)(1), because of the immediate business pressures to enter particular service areas.

As Nextel Partners' network and customer base has increased throughout its service territory, it is now seeking interconnection agreements with other rural ILECs. These ILECs have obligations under Sections 251 and 252 of the Act, and Nextel Partners is entitled to negotiate and arbitrate (if necessary) to reach agreements that are fully consistent with those obligations. Nextel Partners' ability to enforce Sections 251 and 252 is the cornerstone of Congressional policy promoting local competition.

In most states in which Nextel Partners operates it has signed at least one interconnection agreement with a rural ILEC in which it waived its rights to demand cost-based rates and full compliance with the 1996 Act. Its business reasons for taking such actions with regard to a single carrier should not and cannot be construed as a waiver of such rights for all rural ILECs in the state. If an “opt-in” rule were to be adopted, rural ILECs throughout much of Nextel Partners’ service territory could demand that Nextel Partners exchange traffic at the same rates and under the same terms and conditions that Nextel Partners agreed to when it was a new competitive entrant or due to business pressures that no longer exist, even though Nextel Partners would no longer choose to enter into such unfavorable agreements. Such an “opt-in” rule would have the effects of locking Nextel Partners into rates and terms on a statewide basis that were negotiated for a limited service area to meet limited business needs, while simultaneously relieving the rural ILECs from important statutory obligations, contrary to the goals of the 1996 Act.

Moreover, allowing rural ILECs to “opt-in” to the terms and conditions that a competitive carrier may have agreed to in an entirely different local market serves no

legitimate purpose under the Act. As noted above, the opt-in rule is intended to prevent a carrier from inhibiting competition in a local market by discriminating between other carriers competing in the same market. Thus, in order to “level the playing field,” carriers are allowed to opt-in to the same terms and conditions for interconnection that an ILEC provides to other competitive carriers in the same local market. The same concerns and constraints do not support application of the opt-in rule to rural ILECs. The inability of a rural ILEC to “opt in” to the same terms and conditions for interconnection that a given CMRS provider might offer to another rural ILEC serving a different local market does not implicate anticompetitive concerns since rural ILECs serving different markets are not in direct competition with each other.

The MoSTCG proposal would result in anticompetitive harm to competitive wireless carriers by allowing rural ILECs to “opt out” of their Section 251 and 252 negotiation obligations with regard to any wireless carrier that has ever accepted an interconnection agreement that does not provide the full rights set forth in the 1996 Act. As a result, the MoSTCG proposal should be rejected.²⁷

²⁷ Finally, the MoSTCG proposal creates fundamental practical problems. In any given state, for example, Nextel Partners may have an interconnection agreement with ILEC A that has a reciprocal compensation rate of \$x per minute for traffic exchanged at an end office (Type 2B). Nextel Partners may also have an interconnection agreement with ILEC B that has a reciprocal compensation rate of \$x-y for traffic exchanged at an end office. ILEC B, in turn, may have an interconnection agreement with another CMRS provider that includes the same reciprocal compensation rate as its agreement with Nextel Partners. The MoSTCG proposal would allow ILEC B to “opt in” to Nextel Partners’ agreement with ILEC A and obtain the higher rate for Type 2B traffic. Then, Nextel Partners could exercise its own opt-in rights under Section 252(i) and opt into the interconnection agreement that ILEC B has with the other CMRS carrier, with the same lower rate as the original agreement between ILEC B and Nextel Partners. This process could continue endlessly. For this reason it is not practical to give both sides to the negotiation process an “opt in” right and the Commission should therefore decline to adopt the proposal of the MoSTCG.

IV. THE COMMISSION SHOULD GRANT THE CLARIFICATION REQUESTED BY T-MOBILE.

T-Mobile petitions the Commission to clarify the pricing rules that apply during the period of reciprocal compensation negotiations between ILECs and CMRS carriers, as well as to proceedings related to the application of wireless termination tariffs to past periods. Specifically, T-Mobile argues that the pricing procedures of Section 51.707 of the Commission's rules should be applied during the period of reciprocal compensation negotiations, including the proxy rates that were arguably struck down by the Eighth Circuit Court of Appeals.²⁸ Further, T-Mobile argues that the Commission's pricing rules established under Section 51.705 must be applied in assessing the validity of ILEC wireless termination rates for past periods. Nextel Partners supports T-Mobile's petition for the reasons stated therein. For future periods, use of default proxy rates makes sense because the rates will be subject to true-up or true-down at the conclusion of negotiations, and parties will not need to spend resources negotiating interim rates. For past periods, Nextel Partners remains subject to demands by ILECs that it pay non-reciprocal state access rates that could never be justified under Section 51.707 of the Commission's rules. Such demands are inconsistent with the law and were not authorized by the Commission's Declaratory Ruling. In addition,, the clarification requested by T-Mobile also addresses the issue raised by MoSTCG, which contends that an opt-in rule is "especially appropriate" due to the potential uncertainty about what rates apply during the period of negotiations. Accordingly, the Commission should grant the T-Mobile Petition.

²⁸ *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *vacated and remanded in part on other grounds sub nom. AT&T Corp. v. Iowa Utilities Board v. FCC*, 525 U.S. 366 (1999).

V. CONCLUSION

In view of the foregoing, Nextel Partners respectfully requests that the MoSTCG Petition For Reconsideration be denied, and that the Commission grant the Petition for Reconsideration filed by AAPC and the Petitions for Clarification or Reconsideration requested by RCA and T-Mobile, respectively.

Respectfully submitted,

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